MOTION FILED

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No. 97-2063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE JOHN SPERONI, TAMMY SNIDER AND MICHAEL AVERY,

Respondents.

On Petition for a Writ of Certiorari to the Illinois Supreme Court

MOTION AND BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., THE CENTER FOR AUTO SAFETY, THE CONSUMER FEDERATION OF AMERICA, AND THE MASSACHUSETTS PUBLIC INTEREST RESEARCH GROUP IN SUPPORT OF PETITIONER

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MOTION OF PUBLIC CITIZEN, INC., ET AL., FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

This motion for leave to file a brief amicus curiae is filed on behalf of four national consumer advocacy organizations—Public Citizen, Inc., the Center for Auto Safety, the Consumer Federation of America, and the Massachusetts Public Interest Research Group ("MASSPIRG"). Although the real parties in interest in this case have consented to the filing of amicus briefs, respondent the Honorable John Speroni has not, necessitating the filing of the motion under Rule 37(b).

Since its founding in 1971, Public Citizen has advocated before Congress, administrative agencies, and the courts on a wide range of issues of concern to consumers. The Center for Auto Safety, founded in 1970, works to make automobiles safer, more fuel efficient, and more economical. The Consumer Federation of America is the nation's largest consumer advocacy organization representing over 240 state, local, and national consumer organizations and over 50 million American consumers, and is active before Congress, state legislatures, administrative agencies, and in the courts on matters of concern to consumers. Established in 1971, MASSPIRG is a consumer and environmental non-profit organization with 45,000 members across the Commonwealth of Massachusetts. MASSPIRG works on a wide range of consumer, government reform, and environmental matters.

Amici have an interest in this petition for two related reasons. First, they support the use of class action litigation because it provides individuals of modest means access to the civil justice system. The class action can be abused, however, when the class representatives and their lawyers are not attentive to the needs of the absent class members, as amici believe occurred in the present case. Amici, particularly Public Citizen, have worked in the courts to establish rules that provide stricter scrutiny of class actions and greater protections for absent class

members. *See* Henry J. Reske, *Two Wins for Class Action Objectors*, 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing absent class members).

Second, amici are concerned about the particular harms inflicted on the absent class members in this case. In our view, the decision below illustrates what can happen when the judiciary does not exercise proper control over the class certification process. Amici, especially the Center for Auto Safety and the Consumer Federation of America, have worked to open up the automotive parts market to competition from manufacturers other than the original equipment producers, which saves American consumers hundreds of millions of dollars and results in lower automobile insurance premiums. *See generally Design Innovation and Technology Act of 1991: Hearing Before the Subcommittee on Intellectual Property and Judicial Administration of Committee of the Judiciary, House of Representatives*, 102d Cong., 2d Sess. (1992). However, as explained in more detail in the brief that follows, the nationwide class certification approved by the trial court below will undermine this consumer-friendly goal of increased competition and is at odds with state laws that encourage the use of non-original equipment parts. Amicus MASSPIRG has a particular interest in this problem because Massachusetts is one of the states whose law actively promotes such competition. *See* Mass. Regs. Code tit. 211, § 133.04(1).

Finally, although amici agree fully with petitioner that the legal issues presented in the petition are worthy of review and that they were decided incorrectly by the courts below, we take a somewhat different position on how those issues might be resolved by this Court. In sum, this motion should be granted because amici's views provide a different perspective on the questions presented in the petition.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PUBLIC CITIZEN, INC., ET AL.

INTEREST OF AMICI

Public Citizen was founded in 1971 as a public advocacy, lobbying, and litigation organization. On behalf of its 120,000 members, Public Citizen has worked toward the enactment of consumer protection laws, and believes strongly in the need for class actions to enforce effectively those laws because individuals acting alone often do not have the means to do so. Public Citizen recognizes, however, that class actions can be abused, to the detriment of consumers. Thus, through its Litigation Group, Public Citizen has represented objectors in approximately two dozen nationwide class action settlements in which, as in the present case, the named representatives and their attorneys were inattentive to the needs and divergent interests of the absent class members whom they were supposed to represent.[1] In Public Citizen's view, the petition presents an opportunity to resolve lower-court conflicts and strengthen the Court's evolving due process jurisprudence relating to class actions.

The Center for Auto Safety is a nationwide consumer organization with approximately 15,000 members that, for more

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[1] *See, e.g., Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1271 (S. D. Ohio), *on reconsideration*, 927 F. Supp. 1036 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th Cir. 1996); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 U.S. Dist. Lexis 3507 (E.D. La. Mar. 20, 1995); *see generally* Henry J. Reske, *Two Wins for Class Action Objectors*, 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing absent class members).

than 28 years, has worked to make automobiles safer and more economical. Of particular relevance here, since the 1980's, the Center has advocated before Congress and elsewhere to open up the automotive parts market to competition from manufacturers other than the original equipment producers. In the Center's view, competition brings down the price of such parts and, therefore, the cost of automobile insurance to consumers who pay for parts indirectly in the form of premiums.

The Consumer Federation of America ("CFA") is the nation's largest consumer advocacy organization, representing over 240 state, local, and national consumer organizations and over 50 million American consumers. It is active before Congress, state legislatures, administrative agencies, and in the courts on matters of concern to consumers. Over the years, CFA has expended considerable resources on educating consumers and influencing government policies on matters relating to automobile insurance. Of particular relevance to this case, CFA has testified before Congress in opposition to legislation that would give unwarranted monopoly power to makers of original equipment automotive parts.

The Massachusetts Public Interest Research Group ("MASSPIRG") is a consumer and environmental non-profit organization with 45,000 members across the Commonwealth of Massachusetts. MASSPIRG has represented the interests of its members and consumers generally since 1971 on a wide range of consumer, government reform, and environmental matters, including those involving automotive and product safety, ensuring that consumers have a wide choice of safe, competitively priced goods and services. MASSPIRG has a particular interest in the lawsuit before this Court because the suit places in jeopardy a consumer-friendly policy of the Commonwealth of Massachusetts intended to reduce the cost of automobile repairs. *See infra* 8 (discussing Mass. Regs. Code tit. 211, § 133.04).

INTRODUCTION

This case illustrates the ways in which abuse of the class action device—if left unchecked—can harm the interests of the very people it was designed to protect. The certification of a five million person multi-state class, and the inadequate notice to class members permitted by the trial court, threatens to harm the rights of absent class members by: (1) using Illinois law effectively to prevent other states from enforcing their own cost-saving, pro-consumer policies that a majority of class members may in fact support; (2) providing notice by publication only for the entire class when (if class counsel are correct) a significant number of class members have substantial damages claims; and (3) consolidating the liability claims of a multi-state class into one generic claim that ignores important differences in state law that would be of substantial benefit to some significant segment of the class.

Before explaining why this Court should grant review, amici address two points on which we part company with the petitioner. First, we do not agree with petitioner's hyperbolic introductory claim that "[m]ulti-state class actions in state court have become the equivalent of legalized extortion." Pet. 1. Nor do we endorse petitioner's overheated discussion of the supposed "epidemic proportion[s]" of state-court class action abuse. Pet. 24-28. Petitioner's views on this score are anecdotal, and in amici's experience, unfounded. It is our view that both state and federal class actions provide justice in the majority of cases. Moreover, the abuses that do occur—and they do—take place in both state and federal courts. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 807-09 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348 (7th Cir. 1996) (federal court refusal to entertain collateral attack on abusive state court settlement) (Easterbrook, J., joined

by Posner, Manion, Rovner, & Wood, JJ., dissenting from denial of en banc review), *cert. denied*, 117 S. Ct. 1569 (1997). The petition should be granted here, not because of the alleged crisis cited by petitioner, but because the legal issues raised by the petition are recurring and important and the Court's resolution of them will, we believe, help curb abuse in *both* state and federal courts.

Second, amici's principal concern here is not the alleged potential for class action "blackmail," *see* Pet. 28, which we believe is vastly overstated by petitioner. Rather, our concern is with certification of overbroad classes with inadequate notice, such as occurred here, which can affirmatively harm consumers. That harm is inflicted here, as we explain in more detail below, because certification of a multi-state class may sweep aside the rights of consumers in states other than the forum state if the lower court's erroneous application of forum law to a nationwide class is permitted to stand. The kind of abuse that occurred here also injures consumers more generally by fueling the mistaken perception that consumer class actions are out of control. In short, if courts—both state and federal—do not take steps to control class action abuse by establishing proper parameters for certification and notice, legislatures may go too far in the other direction, undermining the class action device and its potential to bring justice to individuals who might not otherwise have access to our civil justice system. With these background points in mind, we now turn to the relevant facts and legal issues.

STATEMENT AND SUMMARY

1. At the heart of this suit is petitioner State Farm's policy favoring the appropriate use of so-called non-original equipment manufacturer ("OEM") crash parts, rather than more expensive parts sold on new assembly-line vehicles. In general,

petitioner authorizes repairs to vehicles covered under its automobile insurance policies using non-OEM parts where those parts can restore the vehicle to its "pre-loss condition" or are of "like kind and quality" as the original part. Class counsel claims that this policy has imposed monetary damages on *all* State Farm policy-holders whose vehicles have been repaired with non-OEM crash parts.

Contrary to class counsel's assertions, consumers benefit both directly and indirectly from policies that encourage the use of non-OEM replacement parts, which is why national consumer groups, such as amici, have long supported such policies. This benefit to consumers occurs not only because non-OEM parts are less expensive than OEM parts, but because their very existence as an alternative to OEM parts serves to stimulate competition and reduce the cost of OEM-parts. For car owners of the do-it-yourself variety, the downward trend that non-OEM parts has on the replacement parts market leads to substantial direct benefits. For car owners who prefer to leave this task to an auto body shop, the savings are apparent on the "parts" portion of the final bill. And of particular relevance here, the use of non-OEM parts benefits policy-holders in general, and the plaintiff class members in particular, by reducing the cost of repairs and thus insurance premiums.

Because crash parts account for nearly half the cost of accident claims, savings on those parts lead to significant reductions in the total cost of post-accident repairs. *Industrial Design Protection: Hearings Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the Committee on the Judiciary, House of Representatives,* 101st Cong., 2d Sess. 282-91 (1990) (statement of Rodger Lawson, Senior Vice-President and economist for the American Alliance of Automobile Insurers). Non-OEM parts can be sold at reduced rates because their manufacturers do not bear the cost of research, development, advertising, or special packaging.

The presence of non-OEM parts as an alternative to OEM parts stimulates competition in the replacement parts market and has forced automobile manufacturers like General Motors to cut the prices of their OEM parts in an attempt to remain competitive. *Design Innovation and Technology Act of 1991: Hearing Before the Subcommittee on Intellectual Property and Judicial Administration of Committee of the Judiciary, House of Representatives*, 102d Cong., 2d Sess. 122-23 (1992) (statement of Mark Silbergeld, Director, Washington Office of Consumers Union); *see also* Claude E. Barfield and Cynthia A. Beltz, *Industrial Design Protection and Automobile Repair Parts: Balancing Competition and Monopoly at Home and Abroad* 49-69 (Feb. 23, 1990) (available through the American Enterprise Institute, Washington, D.C.).

Although some OEM and non-OEM parts are not of high quality, there is no reason to believe that non-OEM parts are generally inferior. The non-OEM crash parts that are the subject of this litigation are held to stringent standards of independent parts-testing agencies that ensure the same quality as their OEM counterparts. Only non-OEM parts certified by the Certified Automotive Parts Association ("CAPA") are used to repair the automobiles that petitioner insures. CAPA conducts "a rigorous testing program" for crash parts under the guidance of an independent testing laboratory. *Design Innovation and Technology Act of 1991: Hearing Before the Subcommittee on Intellectual Property and Judicial Administration of Committee of the Judiciary, House of Representatives*, 102d Cong., 2d Sess. 116 (statement of Clarence Ditlow, Executive Director of the Center for Auto Safety). The CAPA program includes the following:

> [I]nitial on-site inspections of manufacturing plants, review and approval of quality control manuals, periodic re-inspections, demanding

> tests of each part for which certification is desired . . . . The actual part testing procedures include dimensional checks (form and fit), metallurgical analysis (composition, mechanical properties, thickness), corrosion protection and construction requirements.

Id. 116-17.

In sum, for automobile insurance companies that insure millions of drivers, the cost-savings made through the use of non-OEM parts runs into the hundreds of millions of dollars. *Id.* at 112. These savings are often passed on to policy-holders in the form of reduced insurance premiums on collision coverage or lower rates of increase on pre-existing collision coverage premiums. *Id.* at 306 (statement of David F. Snyder, American Insurance Association). Thus, consumers in general benefit from State Farm's policy of promoting the use of non-OEM parts. Since the class members benefit from the policy in question both as consumers and as State Farm policy-holders in particular, there is good reason to believe that, if properly informed, significant portions of the class would support rather than oppose the policy that is challenged in this litigation.

2. The pro-consumer orientation of petitioner's policy highlights the need for adequate notice in the class action context, and thus for the Court to review the decision below permitting publication-only notice to the five million member class here. The Fourteenth Amendment's due process clause requires that government provide certain procedural protections before disposing of the property interests of private individuals. *Mathews v. Eldridge*, 424 U.S. 319, 332-33 (1976). In this case, two sets of legal interests are at stake. First, class members have a right to "opt-out" of the class so that they may litigate their claims by themselves, independent of the class. *See*

Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812-13 (1985). Second, class members have a right to appear in court and oppose litigation brought on their behalf. In the present case, where petitioner's policy favoring the use of non-OEM parts benefits a large segment, if not all, of the plaintiff class, the need for adequate notice is crucial because it permits class members to "check" litigation that may affirmatively harm their interests.

Often times, personal notice is the only way to alert absent class members of litigation that has been brought on their behalf. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-75 (1974). Yet the lower court permitted the class to be notified by publication only, even though the defendant has the names and addresses of a significant segment of the class. Moreover, fairness to the defendant requires that a class action judgment be binding on all class members, but, given the inadequate notice here, State Farm might not be able to obtain the desired *res judicata* effect over class members who did not receive notice even though their names and addresses were readily ascertainable. *See Shutts*, 472 U.S. at 812; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 307, 314-15 (1949).

3. Review is also warranted regarding the propriety of the lower court's decision to apply Illinois law on a nationwide basis, which implicates the due process rights of both the absent class members and defendant State Farm. *Shutts*, 472 U.S. at 815-23. Even if class counsel are correct in their assertion that petitioner's policy violates the Illinois Consumer Fraud and Deceptive Practices Act, 815 Ill. Comp. Stat. 505/1, *et seq.*, other states do not agree with that view and have a substantial interest in applying their own laws. Both Massachusetts and Hawaii, for example, actively promote the use of non-OEM parts. *See* Mass. Regs. Code tit. 211, § 133.04(1) (non-OEM parts "shall be used" absent specific conditions); Haw. Rev.

Stat. Ann. § 431:10C-313.6(a) (insureds who insist on receiving OEM parts must pay the price differential between the OEM-part and a non-OEM part). In this case then, the extra-territorial application of Illinois law impedes the rights of other states to adopt and encourage cost-savings practices for their citizens. Moreover, even if law in other states were deemed *less* favorable to class members than Illinois law—and thus the choice-of-law decision below were said to *favor* the plaintiff class—defendant State Farm may have a right to avoid application of Illinois law with respect to insureds living in other states. *Shutts*, 472 U.S. at 822.

REASONS FOR GRANTING THE PETITION

A. THIS COURT SHOULD CLARIFY THE KIND OF NOTICE THAT THE DUE PROCESS CLAUSE REQUIRES FOR ABSENT CLASS MEMBERS.

The pro-consumer nature of petitioner's non-OEM policy highlights the need for notice to absent class members that is "reasonably calculated to reach interested parties." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 307, 318 (1949). Under *Mullane*, notice serves a dual purpose. First, and more traditionally, it seeks to inform interested parties of pending litigation that may deprive them of their legal claims to certain property. *Id.* at 313. Second, it seeks to increase the chance that unscrupulous counsel who wish to abuse the litigation process to the detriment of the class will be checked or "safeguard[ed]" by those who have been notified. *Id.* at 319. In this case, class counsel assert that, since current postal addresses are known for only part of the class, none of the class is entitled to personal notice. That logic escapes us. In our view, due process requires that, where the names and address of absent class members are known, personal notice by mail is the

constitutionally prescribed standard, at least where the property interest at stake for the individual class member is substantial.

The lack of proper notice is particularly troubling here, where a well-informed class might well register its opposition by intervening or opting out. Where a pro-consumer policy, such as the use of non-OEM parts, is at stake, inadequate notice may mean that class members end up worse-off as a result of the litigation. *Cf. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2250-52 (1997). For instance, without intervention by this Court, given the lower court's insistence that Illinois law is applicable nationwide, this action could result in payment of damages and an injunction against petitioner's non-OEM parts program, leading to large increases in auto insurance premiums. Class members opposed to that result have a right either to opt-out of the class in an attempt to make their opposition to it known or object to it formally in an Illinois court. Without notification, they can do neither.

This Court has been highly skeptical of subjecting the rights of class members to the right-date, right-paper, right-page chance game that characterizes notice by publication. *See Mullane*, 339 U.S. at 315 (noting that publication notice subjects due process rights of stakeholder to chance, and that likelihood of seeing notice is small when notice does not list stakeholder by name); *see also Schroeder v. New York*, 371 U.S. 208 (1962). Only in cases where information regarding the whereabouts of the class member is not known has this Court found that "indirect" and "probably futile" notice is sufficient. *Mullane*, 339 U.S. at 317. Where such information is known, or is "easily ascertainable," *Schroeder*, 371 U.S. at 213, the Court has held that anything less than personal notice violates due process. *See also Mullane*, 339 U.S. at 318 ("Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its

pendency"). Thus, even if, as class counsel contends, the address lists for the class members may not be 100% accurate, the use of mail-forwarding, internet directories, and State Farm's own data-bases require the Illinois courts to insist on methods of notice calculated to reach many more class members than the publication notice sanctioned below.

The decision of the lower court authorizing publication notice to the whole class, on the ground that addresses could not be obtained for a sizable portion of the class, is difficult to square with *Mullane*, which presented strikingly similar facts. There, the Court was confronted with a group of known and unknown trust beneficiaries who had been notified solely by publication in accordance with a state statute. The Court recognized that the beneficiaries whose names and location were unknown could be bound by publication notice alone, but required more for the others:

> The statutory notice to known beneficiaries is inadequate not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand.

Mullane, 339 U.S. at 319.

Although *Mullane* was not technically a class action, it dealt with the rights of what the Court called a "class" of similarly situated beneficiaries. *Id.* at 319. Whether *Mullane*'s due process teachings apply to a state court class action was at issue in *Shutts*, where the Court permitted a Kansas state court to bind a nationwide class of absent plaintiffs seeking money damages because the class members included only those absent plaintiffs who had been notified by first-class mail as evidenced by a signed receipt, in accordance with the requirements of the

Kansas class action procedure. 472 U.S. at 811-13. Because the Kansas rule met due process requirements, *Shutts*, 472 U.S. at 812, the Court had no occasion to decide whether individual first-class mail notice is absolutely required under circumstances such as those presented here, although *Shutts*' admonition that "[t]he notice must be the best practicable," *id.* at 812, certainly suggested that it is.

Petitioner claims that the Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974)—which held that first-class mail notice is required in all actions certified under Federal Rule of Civil Procedure 23(b)(3)—is dispositive here, because, in petitioner's view, *Eisen* relied on a due process rationale. We are less certain of *Eisen*'s direct application to all state court damages class actions, *see* 417 U.S. at 177, but any uncertainty on that question only emphasizes the need for review here.

Two further points not addressed by petitioner heighten the importance of the notice issue and the need for this Court to resolve it. First, petitioner appears to argue that first-class mail notice (and an opportunity to opt out) is constitutionally required at the class certification stage in all class actions where the "predominant" relief sought is money damages. Pet. 20-21 & n.11. We agree that those rights had to be accorded the class here, where, if the allegations in the complaint have merit, some class members may each have claims worth many thousands of dollars. However, in a case where the maximum value of the claim of a plaintiff class member is for less than, say, $100, we are not prepared to argue that, under all circumstances, due process requires that such a class member be given an opt-out right and first-class, rather than publication, notice at the certification stage, after balancing the value of such rights against the cost of preserving them. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

Which brings us to our second point. The court below

assumed that the plaintiffs (and thus, in reality, their counsel) would have to bear the initial costs of notice. Although that is correct in a federal action under the text of Rule 23, *see Eisen*, 417 U.S. at 177-79, it is an open question whether state class action rules may, consistent with due process, require defendants to pay, or assist in reducing, those costs in certain circumstances. In our judgment, due process does not forbid a court that has found that the plaintiffs stand a reasonable likelihood of success on the merits from requiring the defendant to pay some or all of the notice costs, with those costs ultimately to be borne by the losing party. One factor in apportioning notice costs at the certification stage might well be the defendant's ability to reduce those costs by efficiently identifying and locating class members, or even including the notice in the company's regular mailings to its customers. *Cf. Mullane*, 319 U.S. at 318 (noting that first-class mail was practicable in light of trustee's periodic contacts with trust beneficiaries). Although amici doubt that such an option is appropriate here—given our skepticism on the merits of the class claims—the issue of whether due process requires individual notice, paid by the plaintiffs in every case, is fairly included in the question presented and cannot be avoided if the Court is to determine, as we believe it should, the notice issue presented here. *See Mathews*, 424 U.S. at 335 (setting forth due process balancing test).

B. THE DUE PROCESS ISSUES RAISED BY THE LOWER COURT'S NATIONWIDE APPLICATION OF ILLINOIS LAW ARE WORTHY OF REVIEW.

The application of Illinois law to the claims of out-of-state class members permits Illinois to undermine the decisions of sister states to promote the use of non-OEM parts. The Court

should grant review to clarify two related questions relating to multi-state class actions: First, does the due process clause permit the certification of a multi-state class through application solely of forum law in the face of conflicting state laws from other jurisdictions? Second, is the fact that petitioner's headquarters is located in Illinois enough to create sufficient "minimum contacts" between Illinois and out-of-state class members to permit the extraterritorial application of forum law? *See generally Shutts*, 472 U.S. at 815-23.

As noted above, Massachusetts and Hawaii promote the use of non-OEM parts by auto insurance companies. Thus, even if the trial court finds that petitioner's policy favoring non-OEM parts violates the Illinois Consumer Fraud Act and Illinois contract law, as class counsel allege, the court's judgment could not be binding, at the least, on class members who reside in those states. If it were, an Illinois state trial court would have effectively nullified the law of those states. Put another way, because of these stark conflicts in law among the states, due process prevents the application of one state's law to every member of this nationwide class. *See Shutts*, 472 U.S. at 821-22. To hold otherwise, in this case for instance, would allow a single judge or jury sitting in one county of one state to override Massachusetts' decision to promote the use of non-OEM parts to limit the cost of auto insurance.

Furthermore, the application of forum law to out-of-state plaintiffs is limited, in part, by "the expectation of the parties." *See Shutts*, 472 U.S. at 822. Since the law of Massachusetts affirmatively requires the use of non-OEM parts by auto insurers, it was reasonable for petitioner not to expect lawsuits of this kind with Massachusetts residents as plaintiffs. Under the lower court's decision, however, petitioner may be required to pay damages to policy-holders who reside in a state where the law generally mandates the use of non-OEM parts, thus raising significant due process concerns by creating

defendant liability that could be avoided only by violating Massachusetts law. *Cf.* Fed. R. Civ. P. 23 (b)(1)(A) and (b)(2). Moreover, policy-holders in states that permit or encourage the use of non-OEM parts had a right to rely on those laws (and the lower premiums that they bring), and thus they would have no reason to expect that another state's laws would be employed to nullify their own state's pro-consumer policies.[2]

Nevertheless, class counsel contends that across-the-board application of Illinois law to both in-state and out-of-state policy-holders is permissible because Illinois has a significant interest in regulating corporations that operate within its borders. Although the regulation of in-state corporations does provide Illinois some interest in the claims raised by the plaintiff class, that interest is outweighed, in amici's view, by the greater interest that other states have in regulating the corporations that conduct business with their residents. After all, it is the states in which the plaintiffs reside, and not where the corporation is headquartered, that generally must contend with the consequences of corporate misconduct and the costs of regulating that misconduct.

Most of the relevant "contacts" for a non-Illinois policy-

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[2] The enactments in Massachusetts and Hawaii favoring non-OEM parts present the clearest conflict with the class action here, since it invokes Illinois law to obtain a nationwide injunction against any use of non-OEM parts by petitioner. Second Amended Complaint, at 12-13. However, as petitioner points out, many other states permit the use of non-OEM parts in a wide variety of circumstances. *See* Pet. 12 & n.7. Applying the Illinois consumer protection law on a nationwide basis in the manner that class counsel seeks here would effectively override the law of many states and thus runs headlong into the due process principles enunciated in *Shutts*.

holder are in his or her home state. Take, for example, a typical Arizona policy-holder. Generally speaking, the policy-holder would have bought the policy in Arizona on terms approved by Arizona insurance regulators, through an agent based in Arizona, on a vehicle licensed and driven in Arizona. If the vehicle is involved in an accident, it is likely to take place in Arizona. If replacement parts are needed, the repairs will likely be performed in Arizona (and almost certainly will *not* be performed in Illinois). And, ultimately, if the policy-holder seeks to vindicate "rights" such as those asserted in the present lawsuit, one must then determine whether the replacement parts placed on the vehicle in Arizona restored the vehicle to its "pre-loss condition" or are of "like kind and quality" as the vehicle's original parts. In circumstances such as these, it is difficult to see why Illinois law would apply simply because the defendant is headquartered there. As petitioner points out, many courts share this view. *See* Pet. 15. On the other hand, there is some authority for the contrary proposition, *id.*; Pet. App. 10a-11a, and there may be some cases where the law of the defendant's home state might be properly applied to a nationwide class, such as when a defective product were made there. This confusion further demonstrates the need for review of the lower court's choice-of-law ruling.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,*

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